United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-7062

United States Court of Appeals

For the Second Circuit

SIDNEY DANIELSON, Regional Director, Region 2 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondent-Appellant.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR SEATRAIN LINES, INC. As *AMICUS CURIAE*

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STATEMENT OF ISSUES

This case arises from an attempt by a Union of maritime deck officers to restrict the sale of vessels constructed by a shipbuilding company in a manner so as to prevent or inhibit the acquisition of the vessels by any company which does not also have a contract with that Union. The Union's efforts are predicated upon a labor contract which it has with affiliated companies that are, unlike the Shipbuilding Company, engaged in the actual operation of seagoing vessels. The Union has sought to enforce its position by demands for arbitration; that arbitration has been enjoined by the District Court, upon motion of the National Labor Relations Board. The appeal from the District Court's ruling raises certain legal issues:

1. Whether the District Court was clearly wrong in concluding that there was reasonable cause to believe that Section V(2) of the collective bargaining agreement between Seatrain Lines, Inc., and the International Organization of Masters, Mates and Pilots, AFL-CIO, was secondary in thrust and, therefore, violative of Section 8(e) of the National Labor Relations Act, as amended?

2. Whether the District Court was clearly wrong in concluding that there was reasonable cause to believe that the National Labor Relations Board had the right to exercise its judgment that it could and should entertain the charge filed by Seatrain Lines alleging a violation of §8(e) by MM&P instead of deferring that charge to arbitration?

3. Whether the District Court was clearly wrong in concluding that there was reasonable cause to believe that a contract entered into by a "labor organization" (MM&P) was subject to the provisions of §8(e) of the Act even if, in its application, the contract covered only supervisory employees?

4. Whether the District Court was clearly wrong in finding that there was reasonable cause to believe that the sale of a ship by a shipbuilding company constituted an act of doing business within the meaning of Section 8(e) of the Act?

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York (Motley, D. J.) enjoining the Appellant, International Organization of Masters, Mates and Pilots, AFL-CIO (hereinafter "MM&P") from seeking arbitration or in any other manner maintaining, giving effect to, or enforcing certain portions of the collective bargaining agreement between MM&P and Seatrain Lines, Inc. (hereinafter "Seatrain Lines") (Joint Appendix, pp. 30a-31a).* The order was issued pursuant to Section 10(l) of the National Labor Relations Act, as amended (hereinafter "the NLRA" or "the Act")(29 U.S.C.A. §160[l]) upon petition of the Regional Director of Region 2 of the National Labor Relations Board (hereinafter "the NLRB" or "the Board"), and it was predicated upon Judge Motley's finding that there is reasonable cause to believe that Section V(2) of the collective bargaining agreement between Seatrain and MM&P violates Section 8(e) of the NLRA, as

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*The Joint Appendix is hereinafter referred to as "Jt. App. p.____". References to MM&P's Brief are designated "MM&P Br. p.____". References to the Exhibits introduced before the District Court are to the bound volume of Exhibits and are designated "Exhs. p.____".

amended. The text of §10(1) and §8(e) are set forth in an Appendix at the conclusion of this Brief.

At stake in this case is the right of Seatrain Shipbuilding Corp., (hereinafter "Seatrain Shipbuilding" or "Shipbuilding"), a subsidiary of Seatrain engaged in the business of building and selling ships (Jt. App. p. 12), to sell the vessels which it constructs to a ready, willing and able buyer, regardless of that buyer's union affiliation. Seatrain's stake in the resolution of that issue is difficult to overstate. Since the financial viability of Seatrain Shipbuilding depends on its ability to sell one, or possibly two, vessels a year, any significant restriction on that company's market for constructed vessels, particularly in today's economy, could undermine and jeopardize its ability to continue viably in the shipbuilding business. The dimensions of Shipbuilding's undertaking are illustrated by the fact that, with Government cooperation, the Company revitalized the former Brooklyn Navy Yard and has produced the largest vessels ever built in United States facilities (Jt. App. pp. 117-118).

As a shipbuilding company, Seatrain Shipbuilding employs no ocean-going personnel (Jt. App. p. 108). MM&P's claim, therefore, that it has a right to "protect" "jobs" on newly-constructed vessels on which its members were never employed strays far beyond the boundaries of what has been recognized as legitimate work preservation. We submit that MM&P's arguments are even less tenable than the losing arguments advanced in NLRB v. NMU, AFL-CIO, 486 F. 2d 907 (2nd Cir. 1973), cert. denied, _____U.S._____(1974); that this Court's decision in that case is indistinguishable from this case and must, accordingly, control the disposition of this appeal.

FACTS*

Seatrain Lines, Inc. and certain Seatrain subsidiaries are engaged in the operation of oceangoing vessels (Jt. App. pp. 3a [¶5(c)] and 11a [¶7]). Seatrain Lines is party to collective bargaining agreements with the MM&P and those collective agreements (Exhs. pp. 1-76) cover, by their terms,

*We consider a statement of facts necessary because, in its Brief, MM&P has made statements of "fact" which, in some instances, are wholly unsupported by the record and, in other instances, flatly at variance with it.

licensed deck officers employed on the U.S.-flag ocean-going vessels owned or operated as an agent or under bare-boat charter by Seatrain Lines or its "subsidiaries" or "affiliates" as defined in the agreement [Exhs. p. 15, §V(1)(a)]

Seatrain Shipbuilding is a wholly-owned subsidiary of Seatrain Lines and is engaged in the business of building and selling ships (Jt. App. 12-13; 108). At the time of the hearing in this case, Shipbuilding had already built and sold one vessel - the T/T Brooklyn - for the sum of $71 million, and a second vessel - the T/T Williamsburgh - was nearing completion subject to a commitment of sale for the sum of $79 million (Jt. App. pp. 13, 16-23). Three other vessels were in the process of construction (Jt. App. p. 13). Shipbuilding has collective bargaining agreements with several unions*, not including the MM&P, covering the production,

*Production and maintenance employees, numbering approximately 2200-2500, are represented by the United Industrial Workers of North America, affiliated with the Seafarers' International Union of North America, AFL-CIO ("UIW") (Jt. App. 106-107). The UIW also represents approximately 150 clerical employees. District 2 of the Marine Engineers' Beneficial Association ("MEBA") represents Shipbuilding's professional employees, and the Shoreside Supervisors' Union represents the approximately 250 supervisory personnel (Jt. App. pp. 106-07).

supervisory, professional and office-clerical employees employed at its Brooklyn Navy Yard facility (Jt. App. pp. 13, 106-07). As a shipbuilding company, Shipbuilding does not operate any vessels in ocean-going commerce and, accordingly, does not employ any ocean-going personnel (Jt. App. p. 108).

The first vessel constructed by Seatrain Shipbuilding - the T/T Brooklyn - was a 225,000-ton supertanker constructed pursuant to a construction contract entered into between Shipbuilding and Langfitt Shipping Corporation (hereinafter "Langfitt"), also a Seatrain Lines subsidiary, which was formed to serve as a financing vehicle for construction of the Brooklyn (Exhs. pp. 80-96; Jt. App. p. 26). In its capacity as a financing vehicle, Langfitt applied for, and received, ship mortgage insurance pursuant to Title XI of the Merchant Marine Act of 1936 (Exhs. pp. 80-96; Jt. App. pp. 25, 60).

In the case of the second vessel constructed by Shipbuilding, the T/T Williamsburgh, the funds for construction were raised, in part, by Seatrain's trading vessels in to the American Maritime Administration for cash (Jt. App. 67, 71). Those vessels were then chartered back to Seatrain Lines and

operated by it for a period of time and some of them were subsequently laid up (Jt. App. pp. 67, 71, 96). In the case of the Williamsburgh, the corporate financing vehicle was not Langfitt, but Tyler Tanker Corporation (hereinafter "Tyler"), and ship mortgage insurance for the Williamsburgh was applied for by Tyler (see Exhibits, pp. 97-114).

On December 31, 1973, the T/T Brooklyn was sold to Wilmington Trust Company, acting as trustee for the General Electric Credit Corporation (hereinafter "GECC") for the sum of $71 million (Jt. App. 14-19). Concurrent with the sale of the T/T Brooklyn to GECC, Wilmington bareboat chartered the vessel (a bareboat charter is one without crew) to East River Steamship Corporation (hereinafter "East River")(Jt. App. pp. 16-19). East River thereafter entered into a Management Agreement with Anndep Shipping Corporation (hereinafter "Anndep")(Jt. App. pp. 19-20) which, in turn, entered into an Agreement with Westchester Marine Shipping Co., Inc. (hereinafter "Westchester"), pursuant to which Westchester undertook to supply the crew for the T/T Brooklyn (Jt. App. p. 42). Westchester thereafter entered into collective bargaining agreements with MEBA, the Seafarers' International Union, and

the Marine Radio Officers Union covering employees on the T/T Brooklyn (Jt. App. 43-45). The licensed deck officers on the T/T Brooklyn were represented by MEBA, a union with which Westchester had entered into collective bargaining agreements covering other vessels prior to the sale of the Brooklyn (Jt. App.pp. 43-45)*.

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*In its Brief, MM&P argues that none of the transferees or companies operating the T/T Brooklyn had pre-existing contracts with other unions (MM&P Br. pp. 10-11) and, therefore, that the purchasers and operators "were entirely free to recognize and contract with the MM&P" (MM&P Br. p. 20). This is untrue. There is nothing in the record - one way or the other - to indicate whether GECC, East River or Anndep were parties to collective bargaining agreements with any union or unions. However, Westchester, the company hired to furnish a crew for the Brooklyn and the Williamsburgh, did have contracts with another union - namely, District 1 of MEBA - covering deck and engine officers (Jt. App. pp. 43, 47) and there is, therefore, no basis for asserting, as MM&P does, that Westchester was free to enter into a collective bargaining relationship with the MM&P. And, while the President of Westchester did testify that he had no contact with Anndep prior to entering into an agreement with it (Jt. App. p. 48), and that he knew nothing about East River (Jt. App. pp. 49-50), that testimony surely does not establish, as MM&P asserts, that the transferees and operators of the Brooklyn - presumably all of them - were "not established shipping companies". If anything, the evidence is to the contrary, since one of those companies, Westchester, did have contracts with other companies covering other vessels (Jt. App. pp. 45-46) and the principal of another company (Anndep) was "in the shipping business" as an owner, operator and charterer of vessels (Jt. App. p. 49). In all events, the Union's argument is irrelevant since the transferees also had at least the theoretical right to stay free from all Union affiliations.

The sale transaction involving the T/T Williamsburgh was identical to the transaction involving the T/T Brooklyn except that the financing was accomplished through Tyler Tanker Corporation instead of Langfitt, and the Williamsburgh was to be bareboat chartered by Kingsway Tankers, Inc. ("Kingsway") which, in the T/T Williamsburgh transaction, was substituted for East River (Jt. App. pp. 20, 96; Exhs. pp. 97-114)*.

By letter dated April 17, 1974 (Jt. App. p. 77), Captain Robert J. Lowen, International Secretary-Treasurer of MM&P and MM&P's Contract Enforcement Officer, advised Seatrain Lines that MM&P was scheduling for arbitration an alleged contract violation "by reason of the failure to man the SS. Brooklyn with IOMM&P Licensed Deck Officers employed under [the] agreement." (Jt. App. p. 77). Shortly thereafter, Seatrain commenced a proceeding to stay arbitration in the Supreme Court of the State of New York and that Court issued a temporary restraining order staying arbitration (Jt. App. pp. 5a[¶q] and 13a-14a[¶17]). Seatrain's action to stay

*There is no corporate relationship between Seatrain, on the one hand, and GECC, Wilmington Trust, East River, Anndep, Westchester, or Kingsway on the other (Jt. App. pp. 23, 43-44).

arbitration was removed to the United States District Court for the Southern District and is now pending before Judge Constance Baker Motley (74 Civ. 1983).*

By letter dated September 18, 1974 (Exhs. pp. 78-79), MM&P served upon Seatrain Lines and certain other companies, not including Shipbuilding, a second demand for arbitration concerning:

> ". . . our grievance arising out of your violation of the terms of Section V of the current IOMM&P Offshore Division Collective Bargaining Agreement by reason of your failure to man or your failure to secure the manning of the TT Williamsburg [sic] with IOMM&P Licensed Deck Officers employed under that Agreement.
>
> The relief sought by the IOMM&P consists of the following:
>
> 1. The manning of the TT Williamsburg [sic] by IOMM&P Licensed Deck Officers covered by the current IOMM&P Offshore Division Collective Bargaining Agreement.
>
> 2. The lost wages, including overtime, and the contributions to the various Organization Plans for the period of time that the TT Williamsburg [sic] was, is and

*On the basis of the Opinion and Order issued in this proceeding, Judge Motley denied as moot Seatrain's motion to stay arbitration and a motion by MM&P to compel arbitration. Both Seatrain and MM&P have appealed from the denial of their respective motions.

> remains manned by licensed deck officers other than IOMM&P Licensed Deck Officers covered by the current IOMM&P Offshore Division Collective Bargaining Agreement." (Exh. pp. 78-79).

On October 1, 1974, Seatrain Lines filed the unfair labor practice charge which has given rise to this proceeding (Jt. App. pp. 8a-9a), and, as noted above, on December 2, 1974, the Regional Director for Region 2 of the NLRB petitioned for injunctive relief under §10(1) of the Act, as amended (Jt. App. pp. 2a-9a) and Order (Jt. App. pp. 22a-31a). By Opinion dated December 11, 1974 Judge Motley granted the Regional Director's motion for preliminary relief (Jt. App. pp. 22a-31a). This appeal followed.

Seatrain appears in this appeal as amicus curiae pursuant to an order of Judge Timbers dated February 6, 1975 granting a motion by Seatrain for leave to file a Brief as amicus curiae and to participate in any oral argument held in connection with this appeal.

ARGUMENT

I. SECTION V(2) OF THE SEATRAIN-MM&P COLLECTIVE BARGAINING AGREEMENT VIOLATES §8(e) OF THE NLRA, AS AMENDED

A. In An Appeal From The Granting Of Injunctive Relief Under §10(1) Of The Act, The Scope Of This Court's Inquiry Is Limited By The "Clearly Erroneous" Test.

The scope of this Court's inquiry in an appeal from the granting of injunctive relief under §10(1) is extremely narrow. While, in a §10(1) proceeding, the role of the District Court is to determine whether the NLRB's Regional Director has reasonable cause to believe that the unfair labor practice charged has been committed and should be enjoined - a requirement which means there must be a "reasonable possibility" that the unfair labor practice charge will be sustained by the Board, McLeod v. NMU, AFL-CIO, 457 F.2d 1127, 1133 (2d Cir. 1971), this Court has held that in reviewing a District Court's order granting injunctive relief under §10(1) it is "limited by the 'clearly erroneous' test." McLeod v. NMU, supra, 457 F.2d at 1133.

B. Section V(2)(a), As Written And As Enforced By MM&P Against Seatrain In This Case, Is Not Intended To Protect Bargaining Unit Work; It Is Therefore Secondary In Thrust And Violative Of Section 8(e) Of The Act.

Section 8(e) of the NLRA, as amended, makes it an unfair labor practice

> ". . . for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any employer, or to cease doing business with any other person and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void." (29 U.S.C.A. §158[e]).

Section V(2) of the collective bargaining agreement between Seatrain Lines and the MM&P (Exhs. p. 17) provides as follows:

> "2. Sales and Transfers
>
> a. With regard to any sale, charter (but not including a vessel which the Company may be operating under a bareboat charter and the charter is terminated) or any manner of transfer (except sales to foreign flag) of the Company's vessel:

i. At least seventy-two (72) hours prior to the date of the effective transfer of the vessel, written notice must be given to the Organization by the Company.

ii: The execution by the purchaser, charterer or transferee of the Organization's collective bargaining agreement shall be a condition precedent to any sale, charter or transfer.

iii: If the Company violates subsection 2(a)(ii) above, the Arbitrator may include as part of his award, loss of wages and contributions to the various Organization Plans.

iv. A violation of subsection 2(a)(ii) above shall also permit the Organization to cancel the no-strike provisions of this Agreement." (Exhs. p. 17).

The leading case interpreting §8(e) is National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967), in which the Supreme Court held that the "touchstone" in determining the legality of a clause under §8(e) is

> ". . . whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the employer's] employees or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere." National Woodwork Mfrs. Ass'n v. NLRB, supra, 386 U.S. at 644.

This rule was applied to a factual situation virtually identical to the instant case in NMU (Commerce Tankers Corp.), 196 N.L.R.B. 1100 (1972), enf'd, 486 F.2d 907 (2d Cir. 1973), cert. denied, ____U.S.____(1974), in which this Court enforced an NLRB order holding that a clause in a maritime industry contract virtually identical to Section V(2) of the Seatrain-MM&P contract was illegal under §8(e).* That clause, as paraphrased by this Court,

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*The clause in the NMU contract, as quoted by the Court, provided that:

> "(a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term 'transfer' shall be construed to include any chartering of a vessel by the Company.
> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement
> (continued on next page)

> ". . . provides in substance that if Commerce sells a ship to an American flag shipper not already under contract with NMU [the union with whom Commerce had a contract], the ship will be sold with a crew provided by the NMU and Commerce will obtain from the purchaser an undertaking to abide by the NMU contract." NLRB v. NMU, supra, 486 F.2d at 909-910.

We do not see how the Commerce case can be distinguished from this one; if anything, as noted below, MM&P's work preservation arguments are considerably weaker than those advanced in Commerce. Since this Court's decisions in Commerce disposes directly of each and every facet of Respondent's work preservation defense, a close look at that decision is appropriate.

The Commerce case involved the attempted sale of a vessel, the S.S. Barbara, from Commerce Tankers Corporation ("Commerce") to Vantage Steamship Corporation ("Vantage"). Enforcing the above-quoted contract provision, an arbitrator (Theodore Kheel) enjoined Commerce from selling the Barbara until Commerce obtained the undertaking

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and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement." NLRB v. NMU, supra, 486 F.2d at 909 (note 1).

required by its contract with the NMU*. Commerce Tankers, supra, 196 N.L.R.B. at 1100. Commerce thereafter notified Vantage that it could not consummate the sale absent that undertaking. Id. The NMU proceeded to obtain judicial enforcement of the arbitration award; in order to prevent the frustration of its contract and to secure a definitive administrative ruling, Vantage filed unfair labor practice charges with the NLRB.

Both the Board and this Court, in enforcing the Board's order, noted that the maritime industry is a hiring hall industry. This Court observed that in light of that fact the clauses in question did not protect the jobs of the seamen on the vessel when it was sold - since those jobs would be lost in any event - but protected the union's right to continue filling those jobs through its hiring hall, the Union's objective was beyond the scope of legitimate work preservation. Commerce Tankers, supra, 196 N.L.R.B. at 1101; 486 F.2d at 913. Moreover, both the Board and this Court rejected NMU's argument that the "work unit" which it could seek to "protect" was the industry-wide unit co-extensive with its hiring hall.

The first point to be made about the Commerce decision is that the losing arguments in that case are

*The Arbitrator specifically refused to consider the "legality" of the contract clause. 196 N.L.R.B. 1100 (note 4)

considerably stronger than those advanced here, since, as Judge Motley correctly observed (Jt. App. p. 27a), MM&P is claiming the right to "protect" jobs on newly-constructed vessels on which no MM&P members - or any ocean-going personnel, for that matter - were ever employed (Jt. App. p. 108). Even if, notwithstanding Commerce, MM&P could somehow make out a claim that it had a right to protect jobs on ocean-going vessels previously employing MM&P personnel, we fail to comprehend how it can claim to be "preserving" bargaining unit work when it asserts jurisdictional rights to jobs that its members never held. For this reason alone, MM&P's work preservation argument must fail, particularly in the narrow context of a §10(1) appeal.

There are other reasons as well. MM&P concedes in its Brief (MM&P Br., p.25), that when a ship is sold, even to an MM&P-contracting company, the master and the chief officer have no right to continued employment on the vessel. The contract cannot, therefore, be intended to protect their jobs since, like the unlicensed seamen in Commerce, their right to employment ends when the vessel is transferred.

Nor could §V(2) of the Seatrain-MM&P contract operate to protect the jobs of the second and third

mates, the other two job classifications represented by MM&P. Since the effective date of the current agreement, MM&P members are limited to 180 days of consecutive employment on a vessel (Exhs. p. 4(¶g) & p. 5(¶3(a)). After the 180-day period, they must leave the ship, re-register at the hiring hall, take their accrued vacation and then, when their number comes up, ship out on the next available vessel, which could be any vessel covered by an MM&P contract. Thus, even if a sale were made to an MM&P-contracting company, the contract would not protect the jobs of the second and third mates - since those jobs terminate after 180 days in any event - but only their right to remain on board for the balance of the 180-day period. As this Court stated in Commerce Tankers:

> "Therefore, the men working on the Commerce [the selling company's] vessel will lose their jobs regardless of which union gains control of the ship [footnote omitted]. The only difference will be that under the NMU contract, the jobs will be available to seamen with seniority in the NMU hiring hall, while under an SIU contract the SIU hiring hall will be used. Thus, the beneficiaries of the union's clause will not be those members now employed on the vessel, but the union as a whole." NLRB v. NMU, supra, 486 F.2d at 914.*

*The Board reached the same conclusion. Commerce Tankers, supra, 196 N.L.R.B. at 1101.

MM&P seems to be arguing that the nation-wide employment pool created by its various agreements (Exhs., p. 72 (§XXXVII)) is the work unit that it is entitled to protect. This precise argument, however, was made and rejected in the Commerce case. Commerce Tankers, supra, 196 N.L.R.B. at 1100, 1106; NLRB v. NMU, supra, 486 F.2d at 914. As this Court stated:

> "While the cases may use the bargaining unit as a yardstick for the permissible scope of a work preservation clause, we are aware of none that do so where, as here, the suggested bargaining unit is many times larger than the actual work force of the primary employer and where the vast majority of the workers in the supposed unit have no contact at all with the employer." NLRB v. NMU, supra, 486 F.2d at 914.

MM&P also argues that since Seatrain sold older vessels in order to raise the funds to construct new ones, it is, in effect, "utilizing one larger, faster new ship to replace several older ones" (MM&P Br. p. 18 (note)) (emphasis added), and, therefore, that Section V(2) is needed to "protect" the jobs on those older vessels. Since the Brooklyn and the Williamsburgh were never operated by Seatrain, but were sold to unaffiliated companies, MM&P is clearly misstating the facts when it claims that the Brooklyn and the Williamsburgh "replaced" the vessels

which Seatrain retired.

MM&P is actually arguing that since some of the funds used to construct the Williamsburgh (but not the Brooklyn)(Jt. App. p. 67) were obtained by trading in vessels on which MM&P personnel were employed, MM&P somehow has the right to follow the proceeds of that trade-in and represent employees on vessels built with those funds. The fact is that following the trade-in of vessels to the Maritime Administration, all of the traded-in ships continued, for a period of time, to be operated by Seatrain with MM&P personnel (Jt. App. pp. 70-71). MM&P is, thus, in essence, arguing not only that it can "preserve" jobs on a vessel after the vessel has been sold, but that it can follow the proceeds obtained from the sale of the vessel into whatever new investment the company happens to make with those proceeds. And, since that investment (in this case, construction of a ship) may not produce jobs for several years (Jt. App. p. 24), MM&P, under its theory, would have the right to follow the proceeds for an indefinite period of time. Presumably, following this theory to its "logical" conclusion, if a trucking company were to sell some of its trucks and use the funds to open a textile mill, the union representing the truck drivers could lay claim to the jobs in the textile mill under the

guise of "work preservation". This kind of objective, we submit,cannot even arguably give rise to a legitimate work preservation defense.

In short, we think that the Decisions of the NLRB and this Court in NLRB v. NMU, supra, establish beyond any reasonable question that Section V(2) of the Seatrain-MM&P contract is secondary in thrust and, therefore, violative of §8(e) of the Act. In any event, for the limited purpose of this appeal, we think it borders on the frivolous to contend that Judge Motley was "clearly wrong" in concluding, on the basis of the Commerce Tankers decisions of the Board and this Court that the NLRB's Regional Director did not have "reasonable cause to believe" that §V(2) of the Seatrain-MM&P contract ran afoul of §8(e) of the Act. McLeod v. NMU, supra, 457 F.2d at 1133.

C. As To The Contention That MM&P's Attempt To Enforce Section V(2) In This Case Was Primary In Thrust Since, In Arbitration, It Seeks Nothing More Than Money Damages From Seatrain.

MM&P argues that in seeking to enforce Section V(2), it sought nothing more than money damages from Seatrain; that it did not seek to interfere either with the sale of the two vessels or with the operation of either vessel after the sale; and that in permitting the sale,

while seeking money damages from Seatrain after the sale, it was engaging in purely "primary" activity. Put another way, MM&P seems to be contending that since it sought only money damages from Seatrain and not an order enjoining the sale to a third party, Section V(2), as so enforced, did not violate §8(e) since it did not require Seatrain "to cease doing business with any other person".

1. The Relief Sought By MM&P In Arbitration Under The Sale And Transfer Clause (¶2 of §V) Was Not Limited To Damages.

MM&P's argument rests on a misstatement of the facts and a misunderstanding of the applicable law. Reading MM&P's Brief, one might get the impression that the Seatrain-MM&P contract permitted Seatrain Shipbuilding to sell the Brooklyn and the Williamsburgh to non-MM&P contracting companies but simply provided that if Shipbuilding chose to make such a sale, Seatrain could be required "to respond in damages" (MM&P Br., p. 18). Of course, the contract contains no such provision. On the contrary, like the clause found illegal in Commerce Tankers, supra, Section V(2) prohibits the sale of a vessel unless the purchaser executes MM&P's contract in advance.* And, it provides

*See Section V(2)(a)(ii), which states that "execution by the purchaser. . . or transferee of the Organization's collective bargaining agreement shall be a condition precedent to any sale, charter, or transfer." (Exhs. p. 17 (emphasis added)).

that "as part of his award" the Arbitrator "may include . . . loss of wages and contributions to the various Organization Plans" (Exhs. p. 17) (emphasis added).

In seeking to enforce this Section, MM&P at no time - prior to the filing of its Brief in this appeal - limited itself to a damage claim against Seatrain. Rather, its April 17 letter-demand for arbitration with respect to the T/T Williamsburgh (Exhs. pp. 78-79) demanded money damages against Seatrain and "the manning of the T/T Williamsburgh by IOMM&P Licensed Deck Officers" - relief which would necessarily have affected the purchasers and operators of the Brooklyn and the Williamsburgh, who are operating those vessels with deck officers represented by another union.* It is simply incorrect, therefore, on the facts to claim that MM&P's attempt to enforce Section V(2)(a) was "primary" because it was directed only at

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*In its Brief, MM&P claims that it is seeking to arbitrate two different and alternative claims against Seatrain: (1) that the Brooklyn and the Williamsburgh were sold to companies which are "affiliates" or "subsidiaries" of Seatrain within the meaning of the Seatrain-MM&P contract (MM&P Br. pp. 15-17) and (2) that, in the alternative, the sale of these vessels violated the "sale and transfer" clause (§V(2)) of the parties' agreement. As to the second alternative claim, MM&P now claims that the only relief sought under that claim is money damages against Seatrain. The fact is that although MM&P had invoked the "affiliate" and "subsidiary" clause (¶1 of §V) at an early date, it never claimed that the transferees or operators of the Brooklyn and the Williamsburgh were "subsidiaries" or "affiliates"
(continued on next page)

at Seatrain and did not involve any interference with the "operation. . . of either vessel." (MM&P Br. p. 18).

2. Even If MM&P Sought Nothing More In Arbitration Than Money Damages From Seatrain, Its Attempt to Enforce §V(2) In That Manner Would Not Constitute "Primary" Activity.

But even if we assume, arguendo, that MM&P is right on the facts, it would be wrong on the law. If, in other words, MM&P's claim in arbitration was to be limited to a damage claim against Seatrain - which, in point of fact, it was not - it would be "primary" only in the limited sense that MM&P was proceeding in arbitration against a company (Seatrain) with whom it had a contract. But

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of Seatrain. In fact, MM&P explicitly disclaimed any such contention at the hearing before Judge Motley (Jt. App. p. 78 line 25 - p. 79, line 4). Rather, since the two vessels were sold by Seatrain Shipbuilding, and since Shipbuilding was not signatory to any contract with MM&P, it was necessary to invoke the "affiliate" and "subsidiary" clause in order to reach the sale of vessels by Shipbuilding, i.e., MM&P was claiming that Shipbuilding (and possibly Tyler and Langfitt) were "affiliates" and "subsidiaries" of Seatrain and, therefore, that the sale and transfer clause (Section V(2)) applied to a sale of vessels by them. Thus, MM&P is simply wrong on the facts when it claims that the only relief which it sought for the alleged violation of the sale and transfer clause (§V(2)(a)) is money damages against Seatrain. Since, prior to filing its Brief on this appeal, MM&P disavowed any claim that the transferees and operators of the Brooklyn and Williamsburgh were "affiliates" or "subsidiaries" of Seatrain, it is clear that the two-fold relief which it demanded in its April 17 letter-demand for arbitration (Exhs. pp. 78-79), i.e., damages plus the manning of the two vessels by MM&P, were demands for relief under the sale and transfer clause - the only clause that MM&P was relying on at that point in time.

whether a contract, either as written or as applied, is "primary" or "secondary" for purposes of determining unfair labor practice liability does not depend on who the Union is proceeding against but whether

> ". . . the Union's objective was preservation of work for [the employer's] employees." National Woodwork Mfrs. Assn. v. NLRB, supra, 386 U.S. at 645 (1967) (emphasis added); NLRB v. NMU, AFL-CIO, supra 486 F.2d at 912.*

In this case, there can be little serious question that the Union's objective in enforcing the sale and transfer clause was "secondary" in thrust. To begin with, as noted above, the jobs in question are jobs on newly-constructed vessels on which no MM&P personnel were ever employed. By attempting to enforce its contract so as to "preserve" those jobs, MM&P clearly was not "protecting" bargaining unit work but rather seeking to acquire jobs which its members never held.

The claim made in MM&P's Brief that Section V(2) of the contract is intended to protect jobs for "Seatrain deck officers"(MM&P Br. p. 18) is flatly inconsistent both with the position taken by MM&P before the District Court

*Indeed, in most cases in which the Union's objective is held to be "secondary", and the clause in dispute illegal under §8(e), the Union was engaged in "primary" activity in the sense that it was proceeding against an employer with whom it had a contract. Local 537, Milk Drivers, 147 N.L.R.B. 230 (1964), enf'd, 334 F.2d 381 (10th Cir. 1964); Dan McKinney Co., 137 N.L.R.B. 649(1962).

and the NLRB and with the contract itself. Specifically, in the hearing before Judge Motley, MM&P's counsel made it quite clear that the "jobs" which MM&P was trying to protect were not the jobs of Seatrain employees but "the available pool of jobs in an industry which is nationwide in scope." (Jt. App. pp. 75-76; see also p. 87, where Counsel refers to a "wholly integrated nationwide deck officers unit"). Indeed, since, as noted above, no licensed deck officer has a right to continued employment for more than 180 days, the contract could not protect the jobs of Seatrain's deck officers - which would be lost at the end of the 180-day period in any event - but only the union's right "to continue manning the ship from its hiring hall", NLRB v. NMU, AFL-CIO, supra, 486 F.2d at 913 - an objective which this Court held "goes beyond the 'work preservation' of the kind sanctioned in National Woodwork". Id. In short, even if the remedy which MM&P purportedly seeks in arbitration is directed only at Seatrain, its objective - to preserve its nationwide hiring hall and acquire jobs on newly constructed vessels - cannot be found to be "primary" under the decisions of the NLRB and this Court in the Commerce Tankers case.

MM&P's claim that a demand for damages against Seatrain would be "primary" activity is flawed for still

another reason. MM&P appears to be arguing that its contract with Seatrain, as enforced in this case, effectively permits Seatrain to sell a vessel to a non-MM&P contracting company but provides that if Seatrain chooses to make such a sale, it can be required to respond in damages (See MM&P Br., p. 18). The trouble with this argument is that Section 8(e), by its terms, reaches hot cargo contracts whether "express" or "implied." 29 U.S.C.A. §158(e); see, Amalgamated Lithographers of America, Local 17, 130 N.L.R.B. 985, 987 (1961), enf'd in pertinent part, 309 F.2d 31 (9th Cir. 1962). The NLRB has specifically held that:

> ". . . clauses which grant a contracting employer the right to do business with a non-contracting employer, but which impose a substantial penalty or sanction upon the exercise of such right, are in reality, implied agreements that the contracting employer will refrain from doing business with the non-contracting employer." Raymond O. Lewis, 148 N.L.R.B. 249, 253 (1964), remanded, 350 F.2d 801 (D. C. Cir. 1965).*

*Although the Board's Decision in the Lewis case was remanded to the Board and subsequently overruled, W. A. Boyle, 179 N.L.R.B. No. 80 (1969), the basis for both the remand and the Board's subsequent decision - namely, that even if the clause in question did require a cessation of business with a neutral employer it was not illegal since the objective of the clause was "work preservation" -, does not affect the rule as quoted above or the other decisions, like Amalgamated Lithographers Local 17, supra, 130 N.L.R.B. 985, applying that rule.

To fall within §8(e), the clause need not "necessarily . . . cause a complete cessation" in the doing of business with a third party; it is sufficient if it "will exercise a clearly restraining effect on such purchases". Raymond O. Lewis, supra, 148 N.L.R.B. at 253 (note 13).

Similarly, in the Amalgamated Lithographers, Local 19, supra, 130 N.L.R.B. 985, the Board stated as follows:

> "According to Respondents, the new clauses leave to the discretion of the contracting employer whether he shall deal with, or in, the products of any other employer, union or non-union, and do not require him to deal only with union employers.
>
> "Section 8(e) bans 'express or implied' 'hot cargo' agreements. The term 'implied' is used in law as contrasted with 'express' when the 'intention in regard to the subject matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties. (footnote omitted) When contracting parties have agreed that if an employer requests an employee to handle struck or non-union work, the Union shall have the right to terminate the contract* an ordinary remedy for a material breach of agreement by the other party to a contract, and the employer agrees that he will not discharge or discipline an employee

*Similarly, in this case, the contract (§V(2)(a)(iv)) provides, in effect, that if a vessel is transferred without the purchaser adopting the MM&P's contract, the union is free to strike (Exhs. p. 17).

> who refuses to hand[illegible]ch work, the ordinary reme[illegible]lable against a disobe[illegible]mployee, the conclusion is inescapable, and we find, that the parties in substance have 'impliedly' agreed that the employer will not handle such struck or non-union work. An employer who is faced with the possibility of having his contract completely reopened if he handles struck or non-union work cannot realistically be said to act 'voluntarily' in refusing to handle such work (footnote omitted). Amalgamated Lithographers Local 17, supra, 130 N.L.R.B. at 987-88.

So, too, here. The prospect of astronomical damage claims being assessed as a remedy for the transfer of a vessel in violation of the contract*, coupled with the fact that a violation of the sale and transfer clause would permit, if not invite a strike by MM&P against Seatrain, make it clear that the sale and transfer clause, even if enforced in the form of a damage award against Seatrain, amounts not to "primary" activity but to an implied agreement to "cease doing business" with another person, to wit, non-MM&P contracting companies.

D. As To The Contention That The NLRB's Decisions Confirm The Right To Arbitrate Money Damages Under Clauses Claimed To Violate Section 8(e):

MM&P argues that the NLRB has held that "peaceful enforcement of a collective bargaining agreement by the contract's own grievance and arbitration machinery was lawful,

*Under the contract (§V(2)(a)(iii)) (Exhs. p. 17), the "loss of wages and contributions to the various Organization Plans" which the Arbitrator is authorized to award as damages is theoretically open-ended and could cover an indefinite period of years if he concludes that a vessel was transferred in violation of the contract.

even when the provision sought to be enforced was, on its surface, a typical 'hot cargo' clause" (MM&P Br. p. 27), and that, accordingly, MM&P's attempt to invoke the grievance procedure against Seatrain cannot, without more, run afoul of the Act (MM&P Br., pp. 26-28). This argument is based on a patently erroneous reading of the NLRB's decisions.

In order to understand the decisions cited at pp. 26-28 of MM&P's Brief* it must be recognized that each of these cases arose in the construction industry, which is exempt from the substantive provisions of §8(e) by the so-called "construction industry proviso:

> "Provided, that nothing in this Subsection [e] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction, alteration, painting, or repair of a building, structure or other work." 29 U.S.C.A. §158(e).

The issue in each case cited by MM&P was whether the union's actions "were not protected by the construction industry proviso to §8(e) as claims under that proviso cannot be enforced by means proscribed under §8(b)(4) of the Act." Southern California Pipe Trades Dist. Council No. 16, supra,

*The cases relied on by MM&P are: Jt. Council of Teamsters No. 42, 212 N.L.R.B. No. 5 (1974); Operating Engineers Local No. 12, 212 N.L.R.B. No. 4 (1974); Southern California Pipe Trades District Council No. 16, 207 N.L.R.B. No. 58 (1973), and Southern California Pipe Trades Dist. Council No. 16, 207 N.L.R.B. No. 57 (1973).

207 N.L.R.B. No. 58, at 6-7 (1973) (Slip Opinion); see, also Ets-Hokin Corp., 154 N.L.R.B. 839 (1965), enf'd, 405 F.2d 159 (9th Cir. 1968). Unlike §8(e), which makes it unlawful to enter into an agreement requiring an employer to "cease doing business with any other person", i.e., under §8(e) the "hot cargo" clause is itself unlawful, National Woodwork Manufacturers Assn. v. NLRB, supra, 386 U.S. at 634, an unfair labor practice under §8(b)(4) can be found only if the union engages in a "threat" or an act of "restraint" or "coercion" aimed at forcing any person to cease doing business with another person, 29 U.S.C.A. §158(b); see, also Southern California Pipe Trades District Council No. 16, supra, 207 N.L.R.B. No. 58. Thus, in each of these cases, the issue was whether the union's actions, which in the main consisted of peaceful resort to arbitration procedures, could be classified as "restraint" and "coercion"; if so, they would have lost the protection of the construction industry proviso. The Board did not hold, as MM&P claims, that it was lawful to enforce a §8(e) clause in arbitration; rather, it held that peaceful enforcement of a "hot cargo" clause did not constitute an act of "restraint" and "coercion" within the meaning of §8(b)(4) of the Act, 29 U.S.C.A. §158(b)(4) and, therefore, that the construction industry exemption from §8(e) was not lost to the unions in those cases.

In short, the cases cited by MM&P simply hold that

a construction union, whose contracts are exempt from §8(e), can enforce a "hot cargo" agreement by resorting to arbitration. The Board's holdings have no applicability whatsoever outside the construction industry. Elsewhere hot cargo agreements are themselves unlawful regardless of whether the means of enforcement are "peaceful" or not. National Woodwork Manufacturers Ass'n v. NLRB, supra, 386 U.S. at 634.*

*These cases are distinguishable on still another ground. In Ets-Hokin Corp., 154 N.L.R.B. 839 (1965), enf'd, 405 F.2d 159 (9th Cir. 1968), the contract in question provided that a construction contractor who violated the "hot cargo" sub-contracting provisions of the contract was subject to having his contract cancelled. This threat of contract cancellation was regarded by the Board as a form of "coercion" within the meaning of Section 8(b)(4) of the Act, 29 U.S.C.A. §158(b)(4)(B), thereby removing the "limited exemption of the construction industry proviso to Section 8(e)". Ets-Hokin Corp., supra, 154 N.L.R.B. at 843. As a consequence, the contract itself was held violative of §8(e) notwithstanding the construction industry proviso. Id.

Similarly, in this case, if Seatrain is found to have violated sub-paragraph ii of Section V(2)(a), MM&P may "cancel the no-strike provisions" of the Agreement (Exhs. p. 17, §V(2)(a)(iv). This threat of a strike, like the threat of contract cancellation in Ets-Hokin, represents a clear act of "coercion" sufficient to make the contract itself coercive. In short, even if the NLRB's rule was that peaceful enforcement in arbitration of a §8(e) clause was not violative of the Act - and, as noted above, this rule has been applied by the Board only to construction industry contracts - enforcement of §V(2)(a) of the Seatrain-MM&P contract would be exempt from any such rule since the contract itself - and a fortiori, its enforcement - is inherently coercive.

E. As To The Claim That MM&P's Attempted Enforcement Of §V(2)(a) Did Not Constitute A Reaffirmation Of That Clause:

Since Seatrain's unfair labor practice charge was filed more than six months after the execution of the Seatrain-MM&P contract (See Jt. App. p. 8(a)), and since §10(b) of the Act prescribes a six-month statute of limitations, 29 U.S.C.A. §160(b), the alleged violation of §8(e) was based not on the execution of the agreement but upon its reaffirmation within the §10(b) six-month period. (See Jt. App. p. 6a, ¶(8)). Supposedly relying upon this Court's decision in NLRB v. Local 28, Sheet Metal Workers, 380 F.2d 827 (2d Cir. 1967), MM&P argues that no unfair labor practice occurred because: (1) reaffirmation requires both a demand for enforcement of an illegal clause and compliance with that demand; and (2) a "reaffirmation" after the initial six-month period following execution of the contract would be illegal only if "the situation to which the clause is subsequently applied is itself violative of the Act." 380 F.2d at 829-30. (See MM&P Br. p. 19). Neither contention has any merit.

As to the second contention, in the Sheet Metal Workers case, this Court held that regardless of the purpose of the clause when initially executed, the Union, in enforcing the clause in that case, was simply attempting to protect bargaining unit work and, therefore, it could not be said that

"the situation to which the clause [was] subsequently [being] applied [was] itself violative of the Act." NLRB v. Local 28, Sheet Metal Workers, supra, 380 F.2d at 829-30. In contrast, in this case as set forth above, the Union is not seeking to protect bargaining unit work, i.e., the jobs of Seatrain's licensed deck officers, but rather its right to man positions through the Union hiring hall. Moreover, by claiming jobs that its members never held, it is engaging in work acquisition, not work preservation. In short, unlike Sheet Metal Workers, the situation to which §V(2)(a) is being applied in this case is indisputedly secondary in light of the Commerce Tankers decisions.

Nor is there any substance to the claim that a reaffirmation of an illegal §8(e) clause cannot occur unless there is both a demand for enforcement and compliance with that demand. The operative sentences in this Court's opinion are these:

> "In the present case the Board could find in the Union's reliance on Addendum B an unlawful 'reaffirmation' of that clause and a violation of the Act only if the circumstances in which the union sought enforcement of the clause amounted to an attempt to control 'hot cargo' in a manner itself forbidden by the Act. In other words, even if Farrell [the Union President] in demanding that National and Kerby [two employers] not use Johnson's [the neutral employer's] dampers based his claim on Addendum B, his action did not violate Section 8(e) of the Act unless

> the demand itself andcompliance therewith by National and Kerby were the kind of unlawful activity to which Section 8(e) is addressed." 380 F.2d at 830 (emphasis added).

As we read this Opinion, the operative words are contained in the first sentence quoted above, in which this Court states that an unlawful reaffirmation occurs if the circumstances "in which the union sought enforcement of the clause amounted to an attempt to control 'hot cargo'" (emphasis added) in a manner proscribed by the Act. The second sentence, which refers to "demand and . . . compliance" is not, as we read it, intended to establish the legal prerequisites for reaffirmation, but rather to describe what actually occurred in that case, namely, it refers to the fact that in that case there was both a demand and compliance which, according to the Court, would be illegal only if they "were the kind of unlawful activity to which Section 8(e) is addressed." 380 F.2d at 830.

We should add that the cases cited by MM&P (MM&P Br. pp. 19-20) for the proposition that reaffirmation requires both a demand and compliance actually, when read, stand for precisely the opposite conclusion, see IBT Local 695 v. NLRB, 361 F.2d 547, 552 (note 16) (D.C. Cir. 1966); Teamsters Local 537, 147 N.L.R.B. 230, 231 (note 1) (1964); Dan McKinney Co., 137 N.L.R.B. 649, 653-54 (1962); that both the NLRB and the

Court of Appeals for three Circuits have held that compliance is not necessary for reaffirmation, NLRB v. IBEW, 405 F.2d 159, 164 (9th Cir. 1968); NLRB v. Milk Wagon Drivers Union, Local 753, 335 F.2d, 326, 329 (7th Cir. 1964); Los Angeles Mailers Union, ITU v. NLRB, 311 F.2d 121, 123 (D.C. Cir. 1962); Dan McKinney Co., supra, 137 N.L.R.B. at 654; Teamsters Local 537, supra, 147 N.L.R.B. at 231 (note 1); and one Court of Appeals has cited this Court's decision in Sheet Metal Workers for the proposition that compliance is not needed for reaffirmation. NLRB v. IBEW, supra, 405 F.2d at 164.*

*MM&P's contention that a reaffirmation after the §10(b) period requires both a union demand for illegal enforcement and employer compliance with that demand is not only unsupported by the cases, it is nonsensical on its face. It would mean that an employer faced with a demand for unlawful application of a §8(e) clause would have no remedy until he himself acquiesced in that demand and unlawfully complied with it since, prior to his act of unlawful compliance, no violation of the Act would have occurred.

II

MM&P IS A LABOR ORGANIZATION WITHIN THE MEANING OF §8(e) OF THE ACT; A FORTIORI, JUDGE MOTLEY WAS NOT "CLEARLY WRONG" IN CONCLUDING THAT THE REGIONAL DIRECTOR HAD REASONABLE CAUSE SO TO CONCLUDE

MM&P's position, as we understand it, is that even though its collective bargaining agreements with Seatrain were signed by the MM&P in its own name as the International Union (see Exhs., pp. 1 & 76), those agreements apply only to the members of a section of the International - the Offshore Division (MM&P Br. pp. 38-45). It is then argued that since the Offshore Division is allegedly composed entirely of supervisors, it is not a "labor organization" within the meaning of §8(e).* This argument ignores both the plain language of §8(e) and the fact that MM&P, not its Offshore Division, is the party which entered into a collective bargaining agreement with Seatrain.

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*The fact that most members of a union are supervisors does not preclude a finding that that Union is a "labor organization" within the meaning of the Act, 29 U.S.C.A. §152(5), if the number of statutory "employees" is not insubstantial. IOMM&P v. NLRB, 351 F.2d 771 (D.C. Cir. 1965).

Section 8(e) provides, in pertinent part, that:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees to cease . . . doing business with any other person." 29 U.S.C.A. §158(e) (emphasis added).

A "labor organization"is defined as:

> ". . . any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C.A. §152(5).

There can be no serious dispute about the fact that MM&P is a "labor organization" within the meaning of the Act - indeed, the Board and the Courts have so held on numerous occasions, both before and after the revision of the MM&P's constitution in 1970. See, e.g., International Organization of Masters, Mates and Pilots (Marine and Marketing Int'l Corp.), 197 N.L.R.B. No. 69, enf'd, 486 F.2d 1271 (D.C. Cir. 1973), cert. denied, ____U.S.____, (1974); Dente v. Int'l. Org. of Masters, Mates and Pilots, 492 F.2d 10 (9th Cir. 1973), cert. denied, ____U.S.____, (1974); Lykes Bros. Steamship Co., 197 N.L.R.B. No. 68

(1972); Compton v. Int'l. Org. of Masters, Mates & Pilots, 78 L.R.R.M. 2598 (D.C. Puerto Rico 1971)(not officially reported); Int'l. Org. of Masters, Mates & Pilots of America, Inc. (Chicago Calumet Stevedoring Co., Inc.), 144 N.L.R.B. 1172, (1963) (Supplemental decision), enf'd, 351 F.2d 771 (D.C. Cir. 1965). And, this Court has stated that:

> "Once the Board determined on the basis of a full inquiry that MEBA and MM&P were or were not labor organizations, the Board could rely on this [without relitigating the question in each case de novo] unless there was evidence of a change." MEBA v. NLRB, 274 F.2d 167, 175 (2nd Cir. 1960).

A fortiori, for purposes of a §10(l) proceeding, the District Court could find that MM&P was a "labor organization" on the basis of recent Board and Court decisions and without taking evidence on that issue.

As noted above, under §8(e), a hot cargo agreement is unlawful if entered into between an employer and "a labor organization", 29 U.S.C.A. §158(e). The test, under the statute, in other words, is whether the contracting party is a "labor organization", not whether the persons covered by the contract are "supervisors" or statutory "employees". Since MM&P is a "labor organization", and since it is party to the contract, Judge Motley had

ample basis for concluding that there was reasonable cause to believe that MM&P is a "labor organization" for purposes of this proceeding (Jt. App. pp. 25a-26a), even if its contract with Seatrain, in its application, extended only to supervisors.*

MM&P seems also to be arguing that MM&P - the contracting party - cannot be held liable for an unlawful contract provision because, in its application, the contract applies only to supervisors. As noted, this argument runs counter to the plain language of §8(e) - under which the test is not who is covered by the contract, but whether the proscribed agreement is "entered into" by a "labor organization". It is also at variance with rulings by the Courts

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*Of course, at the NLRB hearing, other issues could properly be raised with respect to MM&P's claim that its contract with Seatrain was exempt from the provisions of &8(e). Thus, before the NLRB, Seatrain contended that under the MM&P Constitution and the Offshore Division By-laws, the Offshore Division was functionally inter-related with the International Organization and could not, therefore, be regarded as a "separate" entity. (A similar contention was recently discussed at length and upheld by an NLRB Administrative Law Judge, IOMM&P, NLRB Case Nos. 15-CB-1474 & 1475 (January 17, 1975)). Seatrain also contended that the Offshore Division was not exclusively supervisory but contained statutory "employees." If either of these contentions were accepted, MM&P's attempt to insulate its contract with Seatrain from §8(e) would necessarily fail. For purposes of a §10(1) proceeding, however, these issues need not have been raised in view of the fact that MM&P is itself the contracting party and that MM&P has repeatedly been held to be a "labor organization" within the meaning of the Act.

of Appeals. This Court, for example, has stated that:

> "But the legislative history is far from being so definite or persuasive as to justify our reading the Act, in a manner opposed to its plain language, so as to permit a union in which 'employees participate' to engage in acts branded as unfair labor practices by §8(b) simply because the workers on whose behalf the union was acting are all supervisors." MEBA v. NLRB, supra, 274 F.2d at 173.

To the same effect, see: IOMM&P v. NLRB, supra, 486 F.2d 1271, 1274 (D.C. Cir. 1973).

In short, for the purpose of determining whether there is a reasonable cause to believe that the Seatrain-MM&P contract is subject to the provisions of §8(e), Judge Motley properly relied on the fact that MM&P is the contracting party and that it has repeatedly been held to be a "labor organization" within the meaning of the Act. Just as MM&P, as the party to the contract, unquestionably would have standing to sue to enforce that contract, it must, under the most elementary principles of contract law, assume the reciprocal obligation of liability for any contract illegality.*

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*One cannot help but marvel at the MM&P's intellectual agility on the issue of its status as a labor organization. On numerous occasions, the MM&P has availed itself of the Board's processes claiming that it is a labor organization. (continued on next page)

III

THE DISTRICT COURT HAD REASONABLE CAUSE TO BELIEVE THAT THE NLRB WOULD ENTERTAIN THE CHARGE FILED BY SEATRAIN AND NOT DEFER THAT CHARGE TO ARBITRATION PURSUANT TO THE NLRB'S COLLYER DOCTRINE

In Collyer Insulated Wire Co., 192 N.L.R.B. 837 (1971), the NLRB adopted a policy of deferring to arbitration certain kinds of unfair labor practice charges involving arguable violations both of the NLRA and the parties' collective bargaining agreement. MM&P argues that Collyer, together with other cases cited in its Brief, lead "to the inescapable conclusion that the Board (and the Court on a 10(1) application) is to defer to the arbitrator." (MM&P Br., p. 32).

Although MM&P concludes that deferral to arbitration is "inescapable" in this case, it cites not a single case in which the NLRB has deferred to arbitration on the

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See Timbalier Towing Co., 208 N.L.R.B. No. 89, (1974); B. F. Diamond Construction Co., Inc., 163 N.L.R.B. 161, (1967), enf'd, 410 F.2d 462 (5th Cir. 1969); A. L. Mechling Barge Lines, 192 N.L.R.B. No. 166 (1971). We can only conclude that whether MM&P claims to be a labor organization depends substantially - if not exclusively - on whether it is petitioning for relief in a representation proceeding or defending itself in an unfair labor practice proceeding. Needless to say, this Court's judgment will not be influenced by any such considerations.

kind of legal issue posed by Seatrain's unfair labor practice charge - namely, whether a clause in the parties' collective bargaining agreement is violative of the NLRA. Moreover, it ignores the NLRB's recent decision in Operating Engineers, Local 701, 216 N.L.R.B. No. 45, 88 L.R.R.M. 1243 (1975), in which the Board decided not to defer to arbitration a charge alleging that certain provisions of a collective bargaining agreement were violative of §8(e). At the very least, the Board's decision in Operating Engineers, by itself, establishes that there is reasonable cause to believe that the Board will entertain Seatrain's charge and not defer to arbitration.

Deferral to arbitration in this case is inappropriate for a number of other reasons, enumerated below, any one of which independently preclude a Collyer deferral on the facts of this case.

A. There Is Good Reason To Believe That Use Of The Arbitration Machinery Would Not Resolve The Deferred Unfair Labor Practice Issues

"The requirement that arbitration be likely to resolve the unfair labor practice issues at the same time as the contractual issues goes to the heart of the justification for Collyer." Isaacson & Zifchak, Agency Deferral

to Private Arbitration of Employment Disputes, 73 Col. L. Rev. 1383, 1402 (1973); see, Eastman Broadcasting Co., 199 N.L.R.B. No. 58 at 12-13 (1972)(slip opinion); National Radio Co., 198 N.L.R.B. No. 1 (1972)(slip opinion).

There is a serious question as to whether an arbitrator under the Seatrain-MM&P contract would have jurisdiction to determine whether a contract provision was illegal under the NLRA.* Under the MM&P contract, the arbitrator's jurisdiction is limited to "disputes relating to the interpretation or performance of this Agreement" (Exhs. p. 70 [§XXXVI(a)])(emphasis added). Compare, Collyer Insulated Wire, supra, 192 N.L.R.B. at 839, in which the arbitrator was empowered to resolve "[a]ny complaint or dispute : . . which may arise between any employee or group of employees and the Corporation."**

We seriously question whether an arbitrator, particularly one whose jurisdiction is so carefully

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*Thus, in the Commerce Tankers case, the arbitrator (Theodore Kheel) prohibited Commerce from transferring the S.S. Barbara to Vantage until Commerce obtained the contractually-required undertaking, NMU (Commerce Tankers), supra, 196 N.L.R.B. at 1100 (note 4), without passing upon the legality of the clause under §8(e) of the Act.

**Similarly, in United Optical Workers, Local 408 v. Sterling Optical Co., Inc., 500 F.2d 220, 224 (2nd Cir.
(continued on next page)

circumscribed, would or could undertake to pass upon the kind of legal issue posed by Seatrain's unfair labor practice charge.*

Thus, one of the basic prerequisites for a Collyer deferral is not met in this case - namely, it cannot

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1974), discussed infra, in which Judge Hays stated that the validity of a contract clause under §8(e) "is an issue lying initially in the exclusive province of the arbitrator", the arbitration clause there in question covered "Any and all disputes between the Employer and his employees which cannot be satisfactorily adjusted . . ." Id at 222. See, also, Archibald Cox, The Place of Law in Labor Arbitration, Selected Papers From the First to Seventh Annual Meetings of the National Academy of Arbitrators, 76, 80-82 (1957) (in which Professor Cox, while advocating the position that arbitrators should decide questions of legality, concludes that an arbitrator can determine questions of legality only under a clause embracing "any dispute of any nature or character" and, conversely, that an arbitrator lacks such authority if his jurisdiction is limited to a "dispute concerning the meaning or application of this agreement."

*See, also, Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), in which the Supreme Court noted that while an arbitrator may look to "'the law' for help in determining the sense of the agreement", an award "based solely upon the arbitrator's view of the requirements of enacted legislation . . . would mean that he exceeded the scope of the submission." To the same effect, see: Jt. Bd. of Cloak, Skirt & Dressmakers Union, ILGWU v. Senco, Inc., 289 F. Supp. 513, 519, 525 (D. Mass. 1968) (arbitrator "had no authority to decide" question arising under the Act even though the contract provides that the grievance procedure shall be "the exclusive means for the determination of all disputes, complaints or grievances specified herein").

be said that arbitration is likely to resolve the unfair labor practice issue posed by Seatrain's charge.

B. The National Policy Favoring Arbitration Is Inapplicable In The Circumstances Of This Case

Prior to 1959, attempts to obtain "hot cargo" agreements by means of restraint and coercion were held violative of the Act, specifically §8(b)(4)(A), 29 U.S.C.A. §158(b)(4)(A), but "hot cargo" agreements themselves were not illegal. Local 1976, Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958); see, also, National Woodwork Mfrs. Ass'n v. NLRB, supra, 386 U.S. at 633-634. The purpose of §8(e) was to close that loophole by making the hot cargo agreement itself "void and unenforceable". National Woodwork Mfrs. Ass'n v. NLRB, supra, 386 U.S. at 634.

If, as the complaint alleges, Section V(2) of the Seatrain - MM&P contract is illegal under §8(e), then the process of enforcing that clause through arbitration - indeed, the mere submission to arbitration - would, as the Courts have recognized, amount to a compounding of the statutory violation. McLeod v. AFTRA, 234 F. Supp. 832, 841 (S.D.N.Y. 1964), aff'd 351 F. 2d 310 (2d Cir. 1965); Colonie Hill, Ltd. v. Local 164, Bartenders, 343 F. Supp. 986, 988 (E.D.N.Y. 1972). Thus, far from accommodating the interests of the Act, deferral to arbitration in this case would in a

real sense reinforce and compound the statutory violation inherent in the contract itself.

Enforcement of a §8(e) clause, even for a limited period - indeed, even deferral to arbitration - would be flatly inconsistent with the explicit statutory mandate that "any contract or agreement . . . containing such an agreement [proscribed by §8(e)] shall be to such extent unenforceable and void." (29 U.S.C.A. §158) (emphasis added). Nor could deferral of the instant complaint to the arbitrator, who might then enforce an illegal agreement without passing upon its legality, be reconciled with the mandate of §10(l) of the Act, 29 U.S.C.A. §160(l), which requires that the Board give first priority to §8(e) investigations and [illegible] preliminary injunctive relief in the courts against contracts violative of §8(e). MM&P's contention that Seatrain's unfair labor practice charge alleging a violation of §8(e) should be enforced de facto by submission to arbitration wholly ignores, and is inherently irreconcilable with, the statutory mandate of §10(l) that the Board seek to enjoin enforcement of a clause if it has reasonable grounds to believe that that clause is violative of §8(e).

Finally, underlying the national policy favoring arbitration is the assumption that "arbitration is the substitute for industrial strife," Steelworkers v. Warrior &

Gulf Navigation Co., 363 U.S. 574, 578 (1960) - a form of industrial "therapy", Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964), calculated to further the parties' common goal of "uninterrupted production under the agreement." Steelworkers v. Warrior & Gulf Navigation Co., supra, 363 U.S. at 582.

Here, however, as noted above, Section V(2)(a)(iv) confers on the Union the right to strike if the "sale and transfer" provisions of the contract are violated (Exhs. p. 17). Thus, if this case were deferred to arbitration, and if the arbitrator enforced Section V(2) without passing upon its legality, his award would not only leave unresolved the dispute outstanding between the parties with respect to the legality of §V(2), (See Pt. III(A), infra) but would presumably expose Seatrain Lines to a strike for having "violated" that section. Moreover, in the instant case the controverted clause determines the rights of other parties - Shipbuilding Corporation and the vessels' transferees who are remote from any day-to-day resolution of "industrial relations" problems with the MM&P. None of the reasons for the Board's deferral to arbitration in an appropriate case has a logical or sensible application here, where submission to arbitration would leave the underlying dispute unresolved, the participating company exposed

to a potentially crippling strike, and industrial relations traumatized instead of salved.

C. Deferral Would Severely Prejudice Seatrain

The Board has held that deferral to arbitration is inappropriate where prejudice to any party is not obviated by the Board's retention of jurisdiction over the case (see National Radio Company, Inc., supra, 198 N.L.R.B. No. 1).* Deferral in this case would present the possibility - indeed, the likelihood - of grave and irreparable injury to Seatrain Lines and its subsidiary, Shipbuilding.

As noted above, if this case were deferred to arbitration, it is possible that the arbitrator would decline to decide whether Section V(2) violates the Act and it is, therefore, conceivable that he would rule that Seatrain violated its contract with MM&P by reason of the transfer of a vessel constructed by Shipbuilding to a company that is

*In Collyer and all succeeding cases where the Collyer doctrine is imposed, the Board routinely recites: "In order to eliminate the risk of prejudice to any party we shall retain jurisdiction over this dispute solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act." Collyer Insulated Wire, supra, 192 N.L.R.B. at 843 (emphasis added).

not under contract with MM&P. Requiring Seatrain Lines and Shipbuilding to arbitrate a claim arising under an illegal and unenforceable contract provision would, of necessity, and particularly in view of the stakes involved, entail substantial time, effort and expense regardless of the arbitration's outcome. More important, however, any ruling limiting the potential purchasers of vessels constructed by Shipbuilding would severely jeopardize, not only the sales which have already been made, but the sale of the other vessels to be constructed by Shipbuilding in the future. Since the viability of Shipbuilding as a commercial enterprise is wholly dependent upon its ability to consummate "sales", any significant limitation on Shipbuilding's freedom to sell the vessels which it constructs could undermine and jeopardize the entire Shipbuilding operation. The very pendency of an arbitration proceeding, which would be notice to both present and prospective purchasers of Shipbuilding's vessels, that <u>they</u> may be subject to the MM&P contract, would have the incalculably injurious effect of chilling sales. And an arbitrator's ruling in favor of the MM&P, no matter how erroneous as a matter of law, could interfere with the sale of one or more vessels pending administrative and judicial review of the

legality of §V(2).* In the interim, the restriction on Shipbuilding's ability to engage in the business of constructing ships, the impact of any such restriction on the profitability of Shipbuilding and its ability to transfer its vessels, would be substantial and irreparable.

D. Deferral Is Inappropriate Since All Interests Will Not Be Protected In Arbitration

Deferral under Collyer must be denied where the interests whose protection is at stake are not directly or adequately represented in the arbitration proceedings. See, e.g., Retail Store Employees, Local 1001, 203 N.L.R.B. No. 75, (1973); Standard Scientific, 195 N.L.R.B. No. 182, (1972); Kansas Meat Packers, 198 N.L.R.B. No. 2, (1972); National Radio Company, 198 N.L.R.B. No. 1, (1972).**

In this case, there are significant interests to be protected which would not be represented in an arbitration between Seatrain and MM&P. For example, the owners and operators of the Brooklyn and the Williamsburgh; potential

*See, for example, the scenario of proceedings in the Commerce case, NLRB v. NMU, supra 486 F.2d at 910 (note 3).

**See, e.g., cases of work-assignment disputes, in which the Board has held that deferral is inappropriate if both unions whose interests are affected are not represented in the arbitration procedure (Steelworkers Union, 202 N.L.R.B. No. 78, [1973], and District No. 10, IAM, 200 N.L.R.B. No. 165, [1972]).

purchasers of other vessels constructed by Shipbuilding in the future; and MEBA, which represents the employees on the Brooklyn and Williamsburgh whose jobs MM&P is claiming, are vitally interested in the outcome of these proceedings.* Since, in short, the interests which the Board must seek to protect in a §8(e) proceeding would not be protected - indeed, would not be even represented - in an arbitration proceeding under the Seatrain Lines-MM&P contract, deferral to those arbitration procedures is inappropriate for that additional reason.**

E. Nothing In This Court's Decision In United Optical Workers Union, Local 408 v. Sterling Optical Co., Inc. Suggests That A Deferral To Arbitration Is Appropriate In This Case

United Optical Workers v. Sterling Optical Co.,

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*Clearly, none of these parties would be willing, even if permitted to litigate before the MM&P's industry arbitrator the question of whether a provision in the MM&P's contract violates the Act.

**This argument cannot be dismissed on the ground cited by MM&P - namely, that it has not sought to arbitrate a claim against any of these third parties. While it is technically true that Seatrain is the only party that MM&P is proceeding against in arbitration, the issue which MM&P claims the arbitrator should resolve, i.e., whether §V(2)(a) of the Seatrain - MM&P contract violates §8(e) of the NLRA, is an issue, the resolution of which will substantially affect the rights and obligations of these third parties - none of whom will be represented in an arbitration between Seatrain and MM&P.

500 F.2d 220, 86 L.R.R.M. 3194 (2d Cir. 1974) is wholly inapposite to this case. Sterling Optical was an action under §301 of the NLRA, as amended, 29 U.S.C.A. §185, in which Judge Hays, by way of dicta, stated that "the validity of Article XXVII under §8(e) is an issue lying initially in the exclusive province of the arbitrator." 500 F.2d at 224.

But the Sterling Optical case, as Judge Hays pointed out, "involve[d] coordinating Section 301 jurisdiction with an arbitration clause", id., not, as in this case, coordinating the jurisdiction of the NLRB vis-a-vis an arbitrator. It is one thing to say, as Judge Hays did, that as between the courts and the arbitrator, the arbitrator initially has jurisdiction to pass upon the legality of a clause under §8(e). It is quite another thing to argue, as MM&P apparently does, that in a case where the NLRB has statutory jurisdiction to proceed, Sterling Optical requires that the Board cede its statutory jurisdiction to the arbitrator. That argument overlooks the fact that even if the arbitrator has contractual authority to decide an issue of legality under the NLRA, the Supreme Court has held that his jurisdiction is no more than concurrent with the Board's. Carey v. Westinghouse Electric Corp., supra, 375 U.S. 261.

MM&P's construction of Sterling Optical as requiring a deferral to arbitration would also ignore the mandate

of §10(1) which, as noted above, requires that the Board move in court to enjoin a §8(e) contract, not that it allow de facto enforcement of such a clause in arbitration.* Thus, in stating that the arbitrator had "exclusive jurisdiction" to decide whether a clause violated § 8(e), Judge Hays could only have meant that the arbitrator's jurisdiction was exclusive vis-a-vis the Court, not that the arbitrator could pre-empt the Board's statutory jurisdiction to decide unfair labor practice cases.**

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*That Sterling was not intended to have a bearing on the question of court jurisdiction vis-a-vis the NLRB is confirmed by Todd Shipyards Corp. v. Marine Workers Local 39, 344 F.2d 107 (2d Cir. 1965), a case not overruled in Sterling, in which this Court was "concerned with coordinating [§301] district court and NLRB jurisdiction and we struck the balance in favor of the forum chosen by the plaintiff." 500 F.2d at 224.

**The case of William E. Arnold Co. v. Carpenters District Council, ___U.S.___, 40 L. Ed. 2d 620 (1974), discussed at pp. 29-30 of MM&P's Brief, is also inapposite. In the course of holding that a state court has jurisdiction to enjoin a strike under a no-strike clause even if the strike is arguably an unfair labor practice, the Supreme Court described the Board's Collyer doctrine with apparent approval. Nothing in the Court's opinion, however, remotely suggests that the Board must defer to an arbitrator, or even addresses the question of whether deferral is appropriate in the circumstances of this case.

For all of the reasons set forth above, we submit that the District Court had more than ample basis for concluding that there was reasonable cause to believe that the NLRB would entertain Seatrain's charge and not defer it to arbitration under Collyer.

IV

THE SALE OF VESSELS BY SEATRAIN SHIPBUILDING CONSTITUTES "DOING BUSINESS" WITHIN THE MEANING OF §8(e)

MM&P contends that the sale of ships by Seatrain Shipbuilding did not constitute "doing business" within the meaning of §8(e) (MM&P Br. pp. 36-38).

In the Commerce Tankers case, supra, 196 N.L.R.B. at 1101, the Board held that the sale of a ship by a shipping company in the maritime industry did constitute "doing business" within the meaning of §8(e). While this Court stated that "It may at least be doubted whether an isolated sale of a capital item such as a ship" constitutes an act of "doing business" by a shipping company, NLRB v. NMU, supra, 486 F.2d at 911, we think there can be no serious question but that a company like Seatrain Shipbuilding, which is engaged in the business of building and selling ships (Jt. App. p. 12), is "doing business" when it sells one

of the vessels which it has constructed. In the context of a §10(1) appeal, we submit that it borders on the frivolous to claim, as MM&P must, that the Regional Director did not have "reasonable cause" to believe that the NLRB would so conclude. We need do no more than refer the Court to Petitioner's Exhibits 7 & 8 which by word and picture illustrate the intent, purpose, and activity of Seatrain Shipbuilding Corp. as a serious entrant into the United States shipbuilding business.

V

THE DISTRICT COURT PROPERLY ENJOINED MM&P FROM ARBITRATING UNDER THE ENTIRE SECTION V

On this appeal MM&P now contends that the first issue it seeks to arbitrate is whether the transferees, owners, and operators of the Brooklyn and the Williamsburgh are "subsidiaries and affiliates" of Seatrain within the meaning of the contract and thus bound to the MM&P-Seatrain collective bargaining agreement, (MM&P Br. p. 15). Such an issue, MM&P argues could not violate 8(e).

To begin with, the record is clear that there is no corporate relationship between Seatrain and any of the transferees or operators of the Brooklyn and the Williamsburgh (Jt. App. pp. 20-21, 23, 43-44). And during the

course of the District Court hearing - as well as at the hearing before the NLRB - MM&P was not able to develop any facts which might remotely support any such contention. In fact, at the hearing before the District Court, MM&P explicitly disclaimed reliance on any such theory. (Jt. App. pp. 78-79).*

The fact that there is no evidence whatsoever that the purchasers or transferees are "affiliates" or "subsidiaries" of Seatrain - indeed, the evidence is that they are not - coupled with the fact that MM&P did not even make such

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*See also Jt. App. p. 77, at which MM&P Counsel summarizes the Union's position as follows: "Our contention is that it was perfectly lawful for the union to make a demand to arbitrate the issue as to whether or not Seatrain Lines, Inc. and its subsidiaries and affiliate companies breached the contract in selling in one case and in making a commitment to sell in the other case." In short, as we explained in detail above (pp. 24-26), MM&P's claim was that Seatrain and its subsidiary, Shipbuilding (and possibly Langfitt and Tyler as well), breached the contract with MM&P by selling vessels without securing the contractually-required undertaking from the purchasers, i.e., that these sales violated the "sale and transfer clause" (§V(2)(a)) of the contract. It was the sale by Seatrain and its subsidiaries, (an alleged violation of paragraph 2 of §5), not the sale to a subsidiary or affiliate (paragraph 1 of §V) that MM&P was seeking to arbitrate. The "subsidiary" and "affiliate" clause was invoked simply because the sales were made by Shipbuilding, which was not signatory to any MM&P contract. Those sales could not be covered by the sale and transfer clause (paragraph 2 of §V), in other words, unless they were made by an "affiliate" or "subsidiary" of Seatrains's.

a claim until after the close of the District Court and NLRB hearings, strongly suggests that MM&P is raising this issue now in the hope that it can somehow secure through paragraph 1 of §V (Exhs. p. 16) relief which it could not legally secure under the sale and transfer clause (Paragraph 2 of §V). Invocation of paragraph 1 at this time, in other words, appears to be nothing more than a subterfuge to enable MM&P to avoid the illegality of the sale and transfer clause. Under these circumstances, we submit that the NLRB might properly conclude that enforcement of the "subsidiary" and "affiliate" clause in order to obtain the same relief which MM&P illegally seeks under the sale and transfer clause, i.e., preventing Seatrain from doing business with non-MM&P contracting companies, would bring paragraph 1 (the "subsidiary" and "affiliate" clause), as well as paragraph 2 (the sale and transfer clause) of Section V (Exhs. pp. 16-17) within the proscribed ambit of §8(e).

In the proceeding now pending before the Board, the MM&P has had access to all of the documents constituting the complex commercial transaction of financing, selling, chartering, and operating the biggest tankers ever built in a United States shipyard. The Union has offered some of that material in evidence. Although there has been an extensive evidentiary hearing, the record remains undisturbed that

there is no corporate relationship between Seatrain and any of the vessels' transferees. Yet to the Board, the Union is still contending that there should be no §8(e) finding because of the nature of the transaction. Thus, the Board now has before it the issue of whether the protection of the Act and the freedom to do business with Seatrain Shipbuilding extends to these transferee companies as neutrals. There is no "separate issue" for an arbitrator to decide.

The Union cannot strip the Board of its power to insure the freedom of these companies to do business with each other by shifting its weight from reliance on one paragraph to another paragraph in Section V(2). Permitting such a device would encourage the same frustration of the Board's procedures as we discussed above. Hypothetically, an arbitrator could review the commercial transaction - as conventional as it might be - and determine that General Electric Credit Corporation (GECC) is an "affiliate" of Seatrain within the meaning of the contract as he interprets it. Yet, such a ruling would run directly counter to a Board ruling that as a matter of Federal labor law GECC is an independent business entity with whom Seatrain Shipbuilding can do business without reference to the limitations contained in Seatrain's labor contract with its deck officers.

The circularity of that procedure and the frustration of the Board's authority combine to suggest that this ploy comes too late in the day to fool anyone as to the purpose of the contract clause and the real reason for the Union's insistant demand for some sort of punitive arbitration procedure under its own industry contract. Pending the NLRB's determination, an order enjoining MM&P from proceeding against Seatrain under Section V in its entirety is reasonable - indeed, required if the Union's objective of enforcing an illegal hot cargo clause is to be thwarted.

CONCLUSION

For the reasons set forth above, the order of the District Court should be affirmed.

Dated: New York, New York
March 20, 1975

Respectfully submitted,

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APPENDIX

Section 8(e) of the N.L.R.A., as amended, provides in pertinent part as follows:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work..."29 U.S.C.A. Section 158(e)

Section 10(l) of the NLRA, as amended, provides in pertinent part as follows:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such

investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . ." 29 U.S.C.A. Section 160(1).

- X

SIDNEY DANIELSON, Regional Director, Region 2 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

INTERNATIONAL ORGANIZATION OF MATES AND PILOTS, AFL-CIO,

Respondent-Appellant.

DOCKET NO. 75-7062

CERTIFICATE OF SERVICE

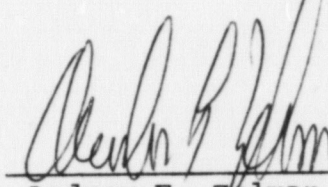
- X

I, Andrew E. Zelman, one of the attorneys for Seatrain Lines, Inc., an amicus party in the above-referenced case, hereby certify that on March 21, 1975 I served the Brief For Seatrain Lines, Inc., as Amicus Curiae, upon Michael London, attorney for Petitioner-Appellee, National Labor Relations Board, by depositing two copies of the same in the U. S. Mail, postpaid, addressed to him at the National Labor Relations Board, Region 2, 26 Federal Plaza, New York, N. Y. 10007.

I further certify that on March 21, 1975 I personally served two copies of Seatrain's Brief as Amicus Curiae upon

Martin Markson, Esq., attorney for Respondent-Appellant,

International Organization of Mates and Pilots, AFL-CIO.



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NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

SURREY, KARASIK, MORSE AND SEHAM

Attorneys for

Office and Post Office Address, Telephone

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BOROUGH OF MANHATTAN NEW YORK, N. Y. 10036

239-7200

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

SURREY, KARASIK, MORSE AND SEHAM

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To

Attorney(s) for

Index No. 75-7062 Year 1975

SIDNEY DANIELSON,
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Respondent-Appellant.

CERTIFICATE OF SERVICE

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To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for